5

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-6985

William Perryman, Petitioner

-vs-

STATE OF OHIO, Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO

OHIO SUPREME COURT

Stephan M. Gabalac
Summit County Prosecutor
City-County Safety Building
Akron, Ohio 44308

Counsel for Respondent

Albert S. Rakas

Margery B. Koosed

Robert J. Croyle

Richard L. Aynes

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325

Parke G. Thompson
Attorney at Law
713 Centran Building
Akron, Ohio 44308

William F. Calhoun
Attorney at Law
141 E. Main Street
Kent, Ohio 44240

Counsel for Petitioner

Supreme Court of the United States

No. A-836

WILLIAM PERRYMAN,

Petitioner,

v.

OHIO

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 27, 19 77.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 13th day of April ----- , 19 77

OHIO BAR

OHIO STATE BAR ASSOCIATION REPORT

SUPREME COURT OPINION

COURT OF APPEALS OPINIONS

(Index Continued On Outside Back Cover)

PUBLISHED WEEKLY BY
OHIO STATE BAR ASSOCIATION

76-1249. To certify record. Overruled.
76-1252. To certify record. Overruled.
76-1253. For leave to appeal. Overruled.
76-1254. For leave to appeal. Allowed.
76-1255. For leave to appeal. Overruled.
76-1256. For leave to appeal. Overruled.
76-1257. To certify record. Overruled.
76-1258. To certify record. Overruled.
76-1261. To certify record. Overruled.
76-1262. To certify record. Allowed.
76-1267. To certify record. Overruled.
76-1268. To certify record. Overruled.
76-1269. For leave to appeal. Overruled.
76-1271. To certify record. Overruled.
76-1273. For leave to appeal. Overruled.
76-1276. To certify record. Allowed.
76-1282. To certify record. Overruled.
76-1283. For leave to appeal. Overruled.
76-1286. For leave to appeal. Overruled.
76-1287. For leave to appeal. Overruled.
76-1289. To certify record. Overruled.
76-1290. For leave to appeal. Overruled.
76-1291. For leave to appeal. Overruled.
76-1292. For leave to appeal. Overruled.
76-1293. For leave to appeal. Overruled.

Rehearing Docket Decisions

Friday, January 28, 1977

76-424. Rehearing denied.
76-583. Rehearing denied.

Thursday, February 3, 1977

76-311. Rehearing denied.
76-1108. Rehearing denied.

State Bar Calendar

February 18—OSBA Executive Committee, Columbus
February 22—District 13 meeting, Youngstown *(Columbiana & Mahoning Counties)*
February 23—District Six meeting, Springfield *(Champaign, Clark, Fayette, Greene, Logan, Madison and Union Counties)*
February 25—District 12 meeting, Cleveland *(Cuyahoga County)*
March 11-12—Committee meetings, Columbus
April 15—Executive Committee, Columbus
MAY 11-13—97th ANNUAL MEETING, CINCINNATI

Statement of the Case.

THE STATE OF OHIO, APPELLEE, *v.* PERRYMAN, APPELLANT.

[Cite as State v. Perryman (1976), 49 Ohio St. 2d 14.]

Criminal law—Aggravated murder—Evidence—Defendant's silence during interrogation—Admissibility—Conviction—Reversible, when—Impermissibly suggestive photographic procedure—Jury verdict—General verdict valid, when—Complicity—Burden of proof—Aider and abettor—Propriety of jury instructions.

1. In the trial of a criminal case, evidence is not admissible which refers to a defendant's asserted silence during custodial interrogation, or to implications drawn therefrom, unless the record clearly demonstrates that the defendant has properly waived his privilege against self-incrimination.
2. Convictions based on eyewitness identification at trial, following a pre-trial identification by photograph, will be set aside only if the photographic identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
3. Where a jury convicts a defendant of an aggravated murder committed in the course of an aggravated robbery, and where that defendant is concurrently acquitted of a specification indicting him for identical behavior, the general verdict is not invalid.
4. In order to convict an offender of complicity, the state need not establish the principal's identity; pursuant to R. C. 2923.03(C), the state need only prove that a principal committed the offense.
5. When the evidence adduced at trial could reasonably be found to have proven the defendant guilty as an aider and abettor, a jury instruction by the trial court on that subject is proper.

(No. 76-583—Decided December 29, 1976.)

APPEAL from the Court of Appeals for Summit County.

Statement of the Case.

On November 27, 1974, Lawrence Busch was shot and killed during an attempted robbery of his business. Two weeks prior to the killing, the appellant and one Richmond had formulated a plan to rob Busch's business. The robbery plan required the use of a stolen car which was to be driven to the Star Market, and then parked at an angle in the parking lot to fake an accident. The appellant and Richmond would then enter the market separately. The appellant was to entice Busch outside the store while Richmond remained inside pretending to be shopping.

The plan then called for the appellant to force Busch, at gunpoint, into the stolen car. It was also planned that the appellant was to be the only robber with a gun. Busch was then to be transported to a designated laundromat where he would be forced to call the store and direct the employees to give Richmond any store money. After receiving the money, Richmond was to leave the store and escape in the appellant's car, which was to be parked in the area.

The appellant and Richmond needed a third person to drive the stolen car, and subsequently took Wendell Pitts into their confidence. Appellant was in charge of the group.

On the day before the robbery, the appellant and Richmond purchased a .38 caliber revolver in Barberton. Appellant signed for this weapon.

On the day of the robbery, the trio proceeded to the NRM Company in Tallmadge to steal a car. The appellant worked at NRM, and the group decided that this would be a good place to obtain a vehicle. Pitts picked out a '65 Buick and "popped" the ignition.

Pitts drove the stolen car to the Star Market with the appellant and Richmond following in appellant's Oldsmobile. The Oldsmobile was parked around the corner from the Star Market, with the keys in it, and the trio then proceeded to the store in the stolen Buick. Appellant went into the market first, with Richmond following a short time later. When the appellant and Richmond could not find the store owner, they went outside the market separately,

at which time the appellant decided that they would re-enter the store and try again to locate Busch. The appellant then entered the store for the second time and directed Richmond to follow. Richmond became frightened and instead of re-entering the supermarket, he went next door to Church's Chicken. Pitts remained in the stolen Buick during these events. As planned, the appellant was the only robber with a gun.

After being at Church's Chicken for approximately two to three minutes, Richmond observed Busch jerk away from the appellant and then saw three gun flashes. Richmond further observed Busch stagger to the front door and saw the appellant jump into the stolen Buick which had already begun to move.

Richmond subsequently returned to the appellant's house where he observed the appellant's Oldsmobile. Pitts and the appellant were inside the house. The appellant told Pitts and Richmond that "I had to do it."

Approximately a month after the killing Richmond took possession of the murder weapon and sold it for $80 and a pound of marijuana. The gun was never recovered.

At trial, Richmond was the state's key witness. To corroborate his story, the state presented the testimony of Arthur Bechter, Karen Purkerson, Michael Alldredge and Donald Woods.

Bechter testified that he was in the sporting goods business in Barberton, Ohio. Bechter testified further that his records indicated that appellant purchased a RG .38 caliber revolver and a box of .38 caliber ammunition, on November 26, 1974.

Karen Purkerson testified that she was the assistant manager of the Church's Chicken, next to the Star Market, at the time Lawrence Busch was killed. Purkerson testified further that on November 27, 1974, at approximately 5:30 p. m., she heard three or four shots come from the Star Market and observed a man jump into a car that left the area. Purkerson's description of the car and suspect, along with the route of the car, corroborated Richmond's testimony.

Statement of the Case.

Michael Alldredge testified that shortly after 5:15 p. m., on November 27, 1974, he was at the Star Supermarket. While he was leaving the store he observed an argument between Busch and a man in the parking lot. The man was trying to get Busch into a 1965 brown Buick. Busch did not get in the car and turned to walk away. Alldredge then also turned and started for his own car. Alldredge then heard three shots, and after a short interval, was almost hit by the Buick as it left the parking lot. Alldredge then followed in the direction of the fleeing car and discovered it in the area. At the trial, Alldredge stated that he was about 85 percent certain that the appellant was the man he observed arguing with Busch in the parking lot.

After being shot, Busch returned to the market where he collapsed between two cash registers and died. The Summit County Coroner testified that Busch was shot three times. Busch had two entrance wounds in the back, and one entrance wound in the chest. The bullet that was recovered from Busch's body was from the frontal wound that perforated the heart. This bullet, from its condition, and from metal scrapings taken from the brick wall of the Star Market, was determined to have ricocheted.

Donald Woods testified that Richmond had traded him a gun (RG .38) for some marijuana. Woods in turn sold the gun to an unidentified man that Woods never saw again.

The state offered further testimony that indicated that appellant had not worked at the NRM Company the three days before the Busch killing, and that the '65 Buick was stolen from the NRM parking lot.

Detective Ed Duvall, Jr., testified that the appellant waived his *Miranda* constitutional rights after his arrest. While being confronted with the evidence against him, the appellant admitted that he did purchase a gun in Barberton, but that he gave it to Richmond "a while back." Appellant then requested an attorney and the questioning ceased.

As indicated, one bullet was recovered from Busch's body, and another .38 caliber bullet was found in the Star Supermarket parking lot shortly after the Busch killing.

A state's ballistics expert testified concerning the class characteristics and the number of lands and grooves on these two bullets. Based on this ballistic examination, expert testimony was offered to establish that the bullets could have been fired from the type of weapon purchased by Perryman the day before the Busch homicide.

On June 30, 1975, the jury found the appellant guilty of aggravated murder with one specification and guilty of aggravated robbery. Following a mitigation hearing, the court sentenced the defendant to death.

The Court of Appeals affirmed the judgment of the trial court, and the cause is now before this court upon an appeal of right.

Mr. Stephan M. Gabalac, prosecuting attorney, and *Mr. Frederic L. Zuch*, for appellee.

Mr. Parke G. Thompson and *Mr. William F. Calhoun*, for appellant.

O'Neill, C. J. Appellant presents 12 propositions of law.

I.

In proposition of law No. 1, appellant claims the trial court violated his Sixth and Fourteenth Amendment rights in allowing in evidence inculpatory double hearsay statements.

At the trial the state called Edward Duvall, Jr., a detective of the Akron Police Department, as a witness. Duvall related a conversation between appellant and another police detective, Captain John Traub. Over appellant's objection, Duvall was permitted to testify that Traub informed appellant that his accomplices had been arrested, and both of them had identified him as the triggerman. Duvall also testified that after appellant was confronted with this statement, he "appeared nervous and hesitated, and then stated that he wished to have an attorney."

The trial court erred in admitting Duvall's account of Traub's experience. The accusatory statements of Traub, as testified through Duvall, are hearsay, and since Traub

and Pitts were not called as witnesses, the admission of these statements violated the defendant's Sixth Amendment right of confrontation. In effect, the state was permitted to put in the mouths of others (Traub and Pitts) not under oath, statements to support and corroborate Richmond's incriminating testimony.

The question is, then, whether the trial court's error was harmless.

In *Schneble* v. *Florida* (1972), 405 U. S. 427, the United States Supreme Court, in dealing with a similar issue, stated:

"* * * In *Bruton*, the Court pointed out that '[a] defendant is entitled to a fair trial, but not a perfect one.' 391 U. S., at 135, quoting *Lutwak* v. *United States*, 344 U. S. 604, 619 (1953). Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. See *Chapman* v. *California*, 386 U. S. 18, 24 (1967). In this case, we conclude that the 'minds of an average jury' would not have found the state's case significantly less persuasive had the testimony as to * * * [the co-defendant's] admission been excluded. The admission into evidence of these statements, therefore, was at most harmless error." See, also, *Brown* v. *United States* (1973), 411 U. S. 223.

In reviewing the entire record, disregarding the objectionable portion of detective Duvall's testimony, this court finds the error constitutionally harmless. *Harrington* v. *California* (1969), 395 U. S. 250; *Chapman* v. *California* (1967), 386 U. S. 18; *Schneble* v. *United States, supra.* Since the state's key witness, Richmond, provided sufficient evidence of appellant's participation in the murder, the detective's testimony was merely cumulative of other corroborating evidence properly before the jury.

This proposition of law is not well taken.

II.

In his second proposition of law the appellant complains that the trial court erred in allowing the state to use, as incriminating evidence, the assertion of his constitutional right to remain silent.

As mentioned in the discussion of appellant's first proposition of law, detective Duvall testified that after Traub had informed appellant that his co-conspirators had identified him as the triggerman, appellant "appeared nervous and hesitated, and then stated he wished to have an attorney." Appellant claims this testimony an impermissible comment on his constitutional right to remain silent.

In Ohio, this issue was discussed in *State* v. *Stephens* (1970), 24 Ohio St. 2d 76, 263 N. E. 2d 773. Citing *Gillison* v. *United States* (1968), 399 F. 2d 586, this court noted, at page 80:

"'The prosecution may not therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.'"

In further discussing the issue, the court stated, at pages 81 and 82:

"In the first detention of a suspect it is not uncommon to react by refusing to discuss the charges until a lawyer can be retained. Desire for friendly counsel and advice can be a major motivation at that time in the mind of one completely innocent of the charges, as well as one who subsequently may admit his guilt.

"His privilege at that time is silence. • • • he should not thereafter be penalized for his original refusal.

"• • •

"Prosecution references to that silence, or any inferences drawn therefrom, are not permissible *unless the record clearly demonstrates by the action and testimony of the defendant that he has waived the privilege previously asserted.*" (Emphasis added.)

This court does not find appellant's argument persuasive on the facts. At the time appellant was interrogated by detective Duvall, he had intelligently, knowingly, and voluntarily waived his *Miranda* constitutional rights. Having done so, it is inconsistent for him to say that his appearance and responses during the interrogation violated his Fifth and Sixth Amendment rights.

This argument is without merit.

III.

As his proposition of law No. 3, appellant contends: "Photographic identification procedures are not to be employed when [a] suspect is in custody and a line-up is otherwise feasible unless [the] police can offer extenuating circumstances justifying [the] use of a photographic identification."

Other than Richmand, the only other identification witness to the crime, Michael Alldredge, was permitted to make an in-court identification of appellant and to testify as to a prior out-of-court identification. The identification occurred four months after the crime. Detectives Singleton and Oldaker went to the home of witness Alldredge and had him view six "mug shot" photos. Appellant's picture was among the photographs.

Although the photographs disclosed, at the bottom, the identifying number, date of arrest and height and weight of each individual photographed, witness Alldredge testified that he did not look at this information in his examination of the pictures. After viewing the photos for about five minutes, Alldredge selected the appellant's photo. At this time, the detectives informed him that appellant was one of the individuals previously arrested for this crime. Prior to that time, the detectives had not mentioned the photographs except for their earlier request to Alldredge that "they had some photographs that they wanted [him] to look at."

Appellant argues that this evidence of identification should have been withheld from the jury. As a matter of due process, appellant contends, photographic identification procedures should not be employed when a suspect is in custody and a line-up is otherwise feasible.

Although appellant cites no controlling authority for his proposition of law to this court, he does rely upon several state Supreme Court decisions so holding. *People* v. *Anderson* (1973), 389 Mich. 155, 186, 205 N. W. 2d 461; *People* v. *Williams* (1975), 60 Ill. 2d 1, 322 N. E. 2d 819; *State* v. *Nettles* (1972), 81 Wash. 2d 205, 500 P. 2d 752.

This court does not find the appellant's arguments

persuasive. The United States Supreme Court specifically approved the use of post-indictment photographic identification procedures in *United States* v. *Ash* (1973), 413 U. S. 300. In that case, following a thorough discussion of the Sixth Amendment right to counsel and photographic displays, the court reached the conclusion, at page 321, that:

"We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required.

"We hold, then, that the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender."

Justice Stewart, in a concurring opinion, discussed the advantages of a photographic display over a line-up, and found, at page 324, that:

"A photographic identification is quite different from a lineup, for there are substantially fewer possibilities of impermissible suggestion when photographs are used, and those unfair influences can be readily reconstructed at trial."

Appellant also suggests that the discrepancy between the identifying witness' initial description of the murderer and appellant's physical characteristics are so diverse as to render the witness' identification suspect. In *Simmons* v. *United States* (1968), 390 U. S. 377, 384, the United States Supreme Court established the following standard for the manner in which photographic arrays were to be conducted:

"* * * we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

Reviewing the facts in the instant case, and applying the test in *Simmons* v. *United States, supra*, this court re-

jects appellant's contention. The inconsistencies in Alldredge's testimony do not indicate an identification procedure so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

Appellant's third proposition of law is not well taken.

IV.

The next proposition of law, No. 4, advanced by appellant is that the verdict was manifestly against the weight of the evidence because the elements of robbery were not proven. Aggravated robbery is defined by R. C. 2911.01, as follows:

"(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

"(1) Have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;

"(2) Inflict, or attempt to inflict serious physical harm on another.

"(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree."

The first requirement, appellant continues, is that one must either commit or attempt to commit a theft offense. The definition of a theft offense is found in R. C. 2913.02, which provides, in pertinent part:

"(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:

"(1) Without the consent of the owner or person authorized to give consent;

"• • •

"(4) By threat."

Relying upon cases construing the language in the statutory predecessor to R. C. 2913.02,* appellant argues

*R. C. 2901.13, predecessor to R. C. 2913.02, provided:
"No person, while armed with a pistol, knife, or other dangerous

that in order to convict a person for a theft offense, the state must prove the defendant to have taken the property or services *from the person* of the victim, or from *his or her presence and immediate control. Turner* v. *State* (1853), 1 Ohio St. 422. Under such a requirement, appellant contends, the state failed to carry its burden of proof in proving all the material elements of aggravated robbery. Appellant concludes as follows:

"Both the state and the Court of Appeals' decision concede that the defendants never intended to take money *from the person* of the [decedent] or money which, as he stood in the parking lot of the Star Market, was under his immediate control or in his presence. Rather the alleged plan was just the opposite—to fully remove the victim from any control over the money by taking him to the laundromat and calling the supermarket, *i. e.*, a ransom if you will. * * * No reasonable interpretation of the facts could conclude that an aggravated robbery had occurred."

In relying upon a statute that was repealed with the enactment of the new Criminal Code in 1974, appellant's argument is not persuasive. Appellant planned to purposely deprive Busch of his property both without his consent and by way of threat. Through the anticipated kidnapping, appellant moreover conspired, and eventually attempted, to obtain or exert control over the property of Busch. Had he succeeded, the requirements of R. C. 2913.02(A)(1) and (4) would have been met. Thus, the evidence indicates that the appellant was guilty of an attempted theft offense.

Since the evidence indicates that appellant had a deadly weapon under his control and inflicted serious physical harm on another, the second requirement for aggravated robbery was also met.

---

weapon, or by force or violence, or by putting in fear, shall steal from the person of another anything of value.

"Whoever violates this section is guilty of armed robbery, and shall be imprisoned not less than ten nor more than twenty-five years, and he shall not have the benefit of probation."

Thus, there is sufficient evidence for the jury to find that the appellant was guilty of aggravated robbery.

This proposition of law is without merit.

V.

Proposition No. 5 reads:

"Where the form of the general verdict and a specification, both within the same court, are identical in the indictment and charge to the jury and the jury returns patently inconsistent verdicts of 'guilty' and 'not guilty,' the general verdict must be set aside as inconsistent and repugnant."

In his fifth assignment of error, appellant argues the general verdict of guilty must be set aside as "patently inconsistent" with the verdict on an identical specification to that charge. The jury found appellant guilty of aggravated murder with a specification, and of aggravated robbery. The murder charge read as follows: "[The defendant and others] * * * did purposely, cause the death of Lawrence J. Bush [sic], while committing, attempting to commit, fleeing immediately after committing or attempting to commit aggravated robbery (R. C. 2911.01), said death being contrary to Ohio Revised Code 2903.01 (B), and further said cause of death being done under aggravated circumstances, to-wit: * * * [The] offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by said defendants, to wit: Aggravated Robbery 2911.01."

Specification two, of which the jury found appellant not guilty, reads as follows:

"The Grand Jurors further find and specify that the offense presented above, the killing of Lawrence J. Bush [sic] was committed while the said defendants were committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery 2911.01."

Appellant argues that there exists a clear inconsistency between the conviction under the general verdict, and the acquittal under the second specification. Under the

general verdict, the jury found that appellant had, in the progress of committing or attempting to commit aggravated robbery, purposely caused the death of Lawrence J. Busch. Under the second specification, the jury found that the appellant had not, in the progress of committing aggravated robbery, purposely killed the decedent. Consequently, appellant concludes, the general verdict of guilty as to count one must be reversed.

In allowing the verdict to stand, we believe the lower court committed no error. The death sentence in the instant case was based on a guilty verdict as to count one and a guilty verdict as to specification one. The sentence was not based on an alleged inconsistency. The guilty verdict for count one reflects the jury's determination that appellant was guilty of the felony-murder. The determinations rendered as to the respective specifications can not change that finding of guilt. Furthermore, as indicated in R. C. 2929.03(A), one may be convicted of aggravated murder, the principal charge, without a specification. Thus, the conviction of aggravated murder is not dependent upon findings for the specifications thereto. Specifications are considered after, and in addition to, the finding of guilt on the principal charge. If more than one specification is charged, a finding of guilty on only one such specification is all that is required in order for the court to render the death sentence

VI.

Proposition of law No. 6 reads:

"When the court • • • [responds] to a jury['s] inquiry that the defendant need not be a 'principal,' the jury must be further apprised that the state must prove beyond a reasonable doubt [that] someone else, identifiable, was the principal."

In its charge, the trial court instructed the jury on the offenses contained in the indictment. It also instructed that the defendant could be found guilty as an aider and abettor.

Since the aider-and-abettor option was before the jury, appellant argues that the court had an obligation to instruct

the jurors that if they found the appellant an aider and abettor to the killing of Busch, then they must further determine that some other identifiable person was the principal.

This proposition of law lacks merit. The state has a burden of proving each element of a crime beyond a reasonable doubt. Under an aider and abettor theory in a felony murder, the identity of the principal is not an element of the crime. Consequently, in order to convict an offender of complicity, the state need not establish the principal's identity. Pursuant to R. C. 2923.03(C), the state need only prove that a principal committed the offense.

VII.

For his seventh proposition of law, the appellant proposes the following:

"When the defendant is ostensibly found guilty [as] an aider and abettor, mitigation under • • • [R. C. 2929.04(B)] must include the mental states of both the principal and the aider. Further, the death penalty is a cruel and unusual punishment for an aider and abettor."

This argument is specious at best. No possible interpretation of this statute would support appellant's argument that the word "offender" must be interpreted as referring to both the principal and the aider and abettor. Neither does the statute require consideration of the principal's mental condition jointly and severally with the mental condition of the aider and abettor.

This argument is rejected.

VIII.

Proposition of law No. 8 reads:

"In Ohio a bill of particulars limits and restricts the proof of the state • • • [to that] in the indictment and the particulars in the bill. A defense which merely refutes the indictment and bill can not constitute the basis for an aider and abettor charge."

During final arguments, the prosecutor suggested to the jury that the appellant could be held liable as an aider and abettor to the crime. Over appellant's objection, the court charged on aiding and abetting.

Appellant argues such a charge prejudicial to his rights. Early in the trial, appellant had filed a motion for a bill of particulars. In response, the state had said that the appellant did shoot and kill one Lawrence J. Busch while attempting to commit aggravated robbery. Appellant argues that once the state particularized that the appellant himself had shot and killed Busch, it could not shift its theory of criminal responsibility. In short, appellant concludes that he had a right to be tried, not as an accomplice to the Busch homicide, but as the principal in the first degree.

This assignment of error is without merit. Upon an examination of the record, it is evident that the state consistently argued that the appellant was the triggerman. It was only on direct examination of defense witnesses that any evidence of aiding and abetting came before the jury. Since appellant presented evidence from which reasonable men could find him guilty as an aider and abettor, the court's instruction was, therefore, proper.

IX.

Appellant's ninth proposition of law reads:

"Where the victim is killed by a richochet [sic] bullet, that fact establishes the reasonable basis for a charge on non-purposeful killing. Each shot must be evaluated as to the intent with which it was fired."

The appellant argues that the trial court erred by its refusal to charge on lesser included offenses, *i. e.*, murder, voluntary manslaughter, and involuntary manslaughter. The basis of this argument is the fact that the fatal bullet ricocheted. Therefore, appellant argues that there was a reasonable basis for a charge on non-purposeful killing. Appellant would have this court hold that evidence that a bullet ricocheted negates a specific intent to kill. However, it was proven that two other shots were fired and entered the victim's body. It is a fundamental proposition that one intends the natural, reasonable and probable consequences of his acts. Certainly, when one discharges a deadly weapon aimed at an individual three times, it can not be said that death was not a natural and probable con-

sequence because one bullet missed, ricocheted and then killed the victim.

This proposition of law is without merit.

X.

As his tenth proposition of law, appellant suggests:

"Identity, which is not an element of the crime, must also be proven beyond a reasonable doubt and the jury must be so charged by the trial court with sufficient separateness to apprise the jury of its independent consideration."

Appellant's contention is that the requested instruction, that appellant's identity must be established beyond a reasonable doubt, was improperly refused. The trial court determined that its general charge covered this question, and we agree with this determination. The court gave the following charge:

"* * * Before you can find the defendant guilty of aggravated murder, you must find beyond a reasonable doubt that Lawrence J. Busch was a living person, and that his death was caused by the defendant in Summit County, Ohio, on or about November 27, 1974."

It is the duty of the trial judge in a jury trial to state all matters of law necessary for the information of the jury in giving its verdict. R. C. 2945.11. As a rule of law, this court has established that "correct and pertinent" requests to charge must be given to the jury, either as specifically proposed, or within the substance of the general charge. *State* v. *Barron* (1960), 170 Ohio St. 267, 164 N. E. 2d 409. We believe the trial court's charge sufficiently conveyed the substance of the appellant's requested charge, and it was not error to refuse to give the requested instruction.

XI.

"Where a material witness changes the path of the fatal bullet at trial (without anticipating of the same by the state, court, or the defense) and the defense was predicated upon reliance on the autopsy protocol so modified, a mistrial should be granted."

In his eleventh proposition of law, appellant argues he was prejudiced by an unanticipated change in the coroner's

testimony. At the time of the shooting, appellant was allegedly behind the victim and to his right. The autopsy report said the bullet traveled from left to right. At trial, the coroner corrected the report, testifying the bullet traveled from right to left. Because of this correction, appellant alleges unfair surprise. The coroner's testimony changing the path of the bullet, he argues, discredited the eyewitness' testimony concerning the position of the shooter, and this knowledge materially altered the defendant's defense.

Considering the evidence, this court believes that the change in the autopsy protocol did not materially affect the appellant's substantial rights under Crim. R. 33(A) so as to require a new trial. First, the coroner's testimony did not "discredit" Alldredge's account of the events. Alldredge never testified as to the exact position of the appellant and Busch. The last thing he observed before the shooting was Busch turning away from the car and beginning to walk away. Alldredge did not observe the shooting, nor the movements or travels of anyone after he himself had turned and walked towards his parked car, until the fleeing car almost hit him. Secondly, one can draw no conclusions as to the shooter's position from the path of the fatal bullet. The record indicates that the bullet ricocheted before entering Busch, and such a fact would allow for various distances and positionings.

Consequently, this argument is without merit.

XII.

In his final proposition of law, appellant asserts:

"The Ohio death penalty statutes, specifically Sections 2929.03 and 2929.04 R. C. are arbitrary, capricious, unreasonable, and violate the Eighth and Fourteenth Amendments."

This proposition of law is without merit. *State* v. *Bayless* (1976), 48 Ohio St. 2d 73.

Accordingly, for the reasons stated, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

NOTE: Because defects on Counsels' copys of the original Decision made it impossible to duplicate readable copies certain portions of this Decision were retyped verbatum and inserted in this copy of the Opinion. The larger type is the original copy for the Court of Appeals and the smaller type is the typewritten copy which has been inserted herein.

STATE OF OHIO)
) ss:
SUMMIT COUNTY)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
(January Term, 1976).

STATE OF OHIO,)
)
Plaintiff-Appellee)
)
v.)
)
WILLIAM PERRYMAN)
)
Defendant-Appellant)

C. A. No. 7867

APPEAL FROM JUDGMENT
ENTERED IN THE COURT
OF COMMON PLEAS OF
SUMMIT COUNTY, OHIO
CASE NO. 75 3 436

DECISION AND JOURNAL ENTRY

Dated: March 31, 1976

This cause was heard February 23, 1976, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

VICTOR, C.J.

Defendant-appellant, William Perryman, appeals from a judgment of guilty of aggravated murder with specifications and aggravated robbery.

On November 27, 1974 Lawrence Busch was fatally shot in the parking lot of the supermarket that he managed. THis crime remained unsolved until the following March when

Delbert Richmond (a confessed participant in the murder) was arrested for an unrelated offense. While the police were questioning him about the unrelated offense, Richmond informed them that he had knowledge of the Busch murder.

Richmond told the police (and later testified at trial) that he, William Perryman and Wendell Pitts planned to rob the supermarket that Busch managed. Their plan was to get Busch out of the store by telling him there was a car accident in his parking lot. They would then abduct Busch and drive to a nearby telephone where Busch would call the supermarket and instruct an employee to empty the contents of the safe and give the money to a certain individual. If this was done, Busch would then be released.

When they tried to execute their plan, they ran into problems. Instead of acquiescing to the abductor's demands, Busch attempted to escape by running back to the store. When Busch began running, one of the would-be abductors shot him three times with a .38 caliber revolver. Richmond identified defendant as the triggerman.

As a result of Richmond's statement, defendant was arrested and tried for Busch's murder. A jury found defendant guilty of aggravated murder with one specification and guilty of aggravated robbery. Defendant did not testify

at trial. Following a mitigation hearing before the trial court, no mitigating circumstances were found and the court sentenced defendant to death. Defendant appeals from that sentence.

Defendant's assignments of error are:

"1. The Defendant was prejudiced by the admission of double hearsay statements, inculpating him, which violated his 6th and 14th Amendment rights.

"2. The Defendant's constitutional rights, as set forth in Griffin v. California and U.S. v. Nolan, were violated. The State may not use at trial the fact that the Defendant claimed his constitutional privileges in the face of accusation.

"3. Photographic Identification procedures are not to be employed when suspect is in custody and a lineup is otherwise feasible unless police can offer extenuating circumstances justifying use of a photographic identification.

"4. The conviction for aggravated robbery, and any specification pertaining to aggravated robbery is against the manifest weight of the evidence and contrary to law.

"5. With the issue clearly before them for factual determination, the jury reached two opposite conclusions in the same count. The verdict is inconsistent and repuguant as to Count 1, aggravated murder and must be reversed.

"6. The jury was improperly instructed as to the import of specification one of the indictment; moreover, the verdict as to specification one must be interpreted as an acquittal of the defendant as a 'principal'; hence, it rendered mitigation based upon the principal's circumstances impossible to demonstrate(his identity not being known); thereby rendering death an arbitrary, capricious and unreasonable penalty.

"7. The court (1) instructed on an aider and abettor theory, (2) refused to charge on a lesser included offense, and (3) refused a charge on identify -- all in error and over objection.

"8. The court erred in not granting a mistrial based upon 'surprise.'

"9. The death penalty is cruel and unusual punishment in violation of the 8th Amendment."

The first assignment of error is not well taken. At trial, the State called Edward Duvall, Jr., a detective of the Akron Police Department, as a witness. Duvall related a conversation between defendant and another police detective, Captain John Traub. Over defendant's objection, Duvall was permitted to testify that Traub informed defendant that the defendant's two accomplices had been arrested and both of them had identified him as the triggerman. Duvall also testified that after defendant was confronted with this statement he "appeared nervous and hesitated, and then stated that he wished to have an attorney." However, before

requesting an attorney, the defendant told Duvall and Traub that he had purchased a gun in Barberton the day before the homicide. This was in response to a statement made by Traub that the police had established that on the day before the homicide Perryman had purchased a .38 caliber revolver. Prior to any interrogation of the defendant, he was given the Miranda warnings and indicated he understood his rights.

Defendant argues that the foregoing testimony was inadmissible. He contends that this testimony constituted double hearsay and denied defendant his Sixth Amendment right to confrontation. Both of these contentions are based upon the fact that only Richmond testified at trial and Pitts did not testify, even though he was available. Thus, not only did the jury learn that a person, not under oath, implicated defendant as the triggerman, but it learned of this fact through the testimony of a witness who was relating what he heard someone else say. In addition, the content of this hearsay testimony was also hearsay.

There is no exception to the hearsay rule which permits the introduction of evidence which is, in effect, double hearsay. Even if such an exception existed, it is not applicable to a situation such as this, where the double hearsay constitutes a violation of defendant's Sixth

Amendment right to confront his accusers. The trial court erred in permitting this evidence to be introduced. However, we find this error to be harmless.

In Schneble v. Florida, 405 U.S. 427 (1972), the Supreme Court, dealing with a similar issue, stated:

> "*** Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. See Chapman v. California, 386 US 18, 24, 17 L. Ed 2d 705, 710, 87 S. Ct. 824, 24 ALR 3d 1065 (1967). In this case, we conclude that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to Snell's admission been excluded. The admission into evidence of these statements, therefore, was at most harmless error." at 432.

See also, Brown v. U.S. 411, U.S. 223 (1973).

Similarly, we find that, given the overwhelming weight of the evidence against defendant, " 'the minds of an average jury' would not have found the State's case significantly less persuasive" had the police detective not testified about Pitts implicating defendant. Richmond's testimony provided sufficient evidence of defendant's participation in the murder and caused the detective's testimony to be more cumulative evidence.

In light of our discussion of the first assignment of error, we hold that the admission of this evidence was

harmless beyond a reasonable doubt. Therefore, the second assignment of error is also without merit.

The third assignment of error is overruled. Defendant fails to cite one controlling authority for his proposition that a photographic array cannot be utilized to identify a suspect when a line-up procedure is feasible. The photographic array is an effective means of identifying a suspect if proper safeguards are taken. We do not find persuasive either the law or the policy considerations maintained by defendant in support of his contention.

Defendant also maintains that the discrepancy between the identifying witness' initial description of the murderer and defendant's physical characteristics are so diverse that it renders the witness' identification suspect. As further proof, defendant asserts that the witness only took five minutes to identify defendant from the array and stated he was 80-85% certain of his identification. Defendant argues that his Fifth and Fourteenth Amendment guarantees were violated by this "tainted" identification. The test for determining the constitutionality of a photographic array is stated in Simmons v. U.S., 390 U.S. 377 (1968), where the Supreme Court stated:

"*** [w]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on the ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. ***." at 384.

Applying this test to the facts, we determine that the identification of defendant at trial was entirely proper.

Assignment of error four is also without merit.

Aggravated robbery is defined by R.C. 2911.01 as follows:

"(A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

"(1) Have a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;

"(2) Inflict, or attempt to inflict serious physical harm on another.

"(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree."

The first requirement is that there must be an attempt to commit or the commission of a theft offense. The appropriate definition of a theft offense is found in R.C. 2913.02, which provides in pertinent part:

"(A) No person, with purpose to deprive the owner of property or services, shall

knowingly obtain or exert control over either:

"(1) Without the consent of the owner of person authorized to give consent; ***

"***

"(4) By threat. ***."

Defendant planned to use Busch as a means to threaten the supermarket. In other words, defendant attempted to gain control over the money in the supermarket by holding a hostage. The requirements of R.C. 2913.02(A)(4) would have been met had defendant succeeded. Thus, the evidence indicates that defendant was guilty of an attempted theft offense.

Since the evidence indicates that defendant had a deadly weapon under his control and inflicted serious physical harm on another, the second requirement for aggravated burglary was also met.

Thus, there is sufficient evidence for the jury to find that defendant was guilty of aggravated robbery.

Assignment of error six is rejected. The jury found defendant guilty of aggravated murder. The jury verdict form for specification one reads:

"We, the Jury in this Case, being duly impaneled and sworn to well and truly try and true deliverance make between the State of Ohio and the defendant, William Perryman, do find the defendant guilty of a specification contained in that portion of the indictment for aggravated murder, to-wit: that said offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by said defendant, to-wit: aggravated robbery."

The jury form for specification two reads:

"We, the Jury in this Case, being duly impaneled and sworn to well and truly try and true deliverance make between the State of Ohio and the defendant, William Perryman, do find the defendant not guilty of a specification contained in that portion of the indictment of aggravated murder, to-wit: That the defendant did purposely kill Lawrence Busch while the defendant was attempting to commit the crime of aggravated robbery."

It is quite evident from these forms that no inconsistent verdict exists. The first specification concerns a committed aggravated robbery while the second specification concerns an attempted aggravated robbery. If the jury found defendant guilty of both specifications, a definite inconsistency would have existed. But, as the verdict now stands, there is no inconsistency.

The sixth assignment of error also lacks merit. In its charge, the trial court instructed the jury on the offenses contained in the indictment. It also instructed that defendant could be found guilty as an aider and abettor.

During deliberations, the jury inquired:

> "Would guilt on specification number one indicate that the defendant was the triggerman?"

The trial court's reply was, "not necessarily." Thereafter, the jury returned a guilty verdict on specification one.

Defendant argues that is unclear whether the jury found defendant guilty as the triggerman or as an aider and abettor. He maintains that a defendant must have the verdict most liberally construed in his favor and that the jury must have found him guilty as an aider and abettor. If this is true, defendant maintains that the State failed to establish who the principal was and, as a result, his conviction cannot stand. (Citing State v. Glaros, 114 Ohio App. 185 (1961).

Furthermore, it is argued that R.C. 2929.04(B)(1)-(3) requires knowledge of the mental state of the principal if mitigating circumstances are being considered for an aider and abettor. And, without the knowledge of the principal's mental condition, the imposition of the death penalty is arbitrary and capricious and, therefore, unconstitutional.

Assuming without deciding that defendant's initial argument is correct, the remainder of the argument is incorrect. Defendant relies on syllabus two in State v.

;laros, supra, which provides:

> "An accused cannot be found guilty of the crime of embezzlement as an aider and abettor until the prosecution establishes beyond a reasonable doubt that the claimed principal was guilty of embezzlement. And a plea of guilty by such alleged principal in an action other than that involving such accused is not admissible in evidence in the trial of such accused, except by stipulation."

In Glaros, the court determined that the defendant, who was charged with aiding and abetting, could not be convicted as an aider and abettor since the State failed to prove that all of the elements of embezzlement existed as to the alleged principal. This is not the case before us. There is no question that a man was murdered during an aggravated robbery. The identity of the principal is not crucial, so long as it is certain that one exists. Under R.C. 2923.03 (B) a principal offender need not be convicted before a defendant can be found guilty of complicity. Thus, we determine that the State met its burden of proof by establishing all the elements of the alleged crimes beyond a reasonable doubt.

Defendant's argument concerning the constitutionality of R.C. 2929.04 (B) (1)-(3) is specious at best. No possible interpretation of this statute would support defendant's argument that the word "offender" must be interpreted as

both the principal and the aider and abettor. Neither does the statute require consideration of the principal's mental condition jointly and severally with the mental condition of the aider and abettor.

The seventh assignment of error also lacks merit. Defendant's objection to the aider and abettor instruction was properly overruled. The State maintained throughout the trial that defendant was the triggerman. It was only on direct examination of defense witnesses that any evidence of aiding and abetting came before the jury. Since the defendant presented evidence from which reasonable men could find defendant guilty as an aider and abettor, the instruction was proper.

Defendant's second argument concerns the trial court's refusal to instruct the jury on the lesser includes offenses of murder, voluntary manslaughter and involuntary manslaughter. Defendant maintains that since the bullet which actually killed Busch ricocheted off a wall before striking Busch, a reasonable man could find that this negated specific intent, one of the requisite elements.

This might be true if only one shot had been fired at Busch. However, three bullets entered Busch's body. Thus, the fact that one bullet ricocheted before hitting Busch

has no effect as far as negating an element of aggravated murder. Since no reasonable man could find a lesser included offense from the evidence presented, the trial court properly refused to instruct on lesser included offenses.

Defendant's third contention is that the requested instruction, that defendant's identity must be established beyond a reasonable doubt, was improperly refused. The trial court determined that its general charge covered this question, and we agree with this determination.

In its charge to the jury, the trial court stated:

> "Before you can find the Defendant guilty of aggravated murder, you must find beyond a reasonable doubt that Lawrence J. Busch was a living person, and that his death was caused by the Defendant in Summit County, Ohio, on or about November 27, 1974."

This statement sufficiently conveyed the substance of defendant's requested charge, and it was not error for the trial court to refuse to give the requested instruction. See, State v. Barron, 170 Ohio St. 267 (1960).

The eighth assignment of error is also without merit. Defendant claims he is entitled to a new trial because he was surprised at trial, and this surprise materially affected his defense. Crim. R. 33 (A)(3). The alleged surprise involves the Coroner's testimony that the Autopsy

Protocol was incorrect in that the fatal bullet actually travelled right-to-left instead of left-to-right. It is argued that this change of direction discredits the eyewitness' testimony concerning the position of the shooter, and this knowledge materially altered defendant's defense.

The error in this argument is that the record indicates that the fatal bullet ricocheted before entering Busch. Thus, no conclusions as to the shooter's position may be drawn from the path of the bullet. Defendant has failed to demonstrate how his defense was materially impaired by the correction in the Autopsy Protocol.

Defendant's last assignment of error is also without merit. This court has previously determined that the death penalty does not constitute cruel and unusual punishment in violation of the Eighth Amendment of the Constitution of the United States. See, State v. Bayless, Summit No. 7513 (9th Dist. Ct. of App., Feb. 5, 1975). Defendant's arguments fail to convince us that our previous determination was in error. Accordingly, we follow our holding in Bayless, supra.

The defendant has received a fair trial free of prejudicial error and, accordingly, the judgment is affirmed.

Judgment affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Court of Common Pleas to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Ten days from the date hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals, at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

William H. Victor
Presiding Judge
- for the Court -

MAHONEY, J. and
BRENNEMAN, J. CONCUR.

APPEARANCES:

STEPHAN M. GABALAC, Summit County Prosecutor (Frederic L. Zuch, Asst. Prosecutor), City-County Safety Building, 53 East Center Street, Akron, Ohio 44308, for Plaintiff-Appellee.

PARKE G. THOMPSON, Attorney at Law, 707 Centran Building, Akron, Ohio 44308, and WILLIAM F. CALHOUN, Attorney at Law, 141 East Main Street, Kent, Ohio 44240 for Defendant-Appellant.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 35562

State of Ohio

PLAINTIFF- APPELLEE

-vs-

Howard Hudson

DEFENDANT- APPELLANT

APPEAL FROM

COMMON PLEAS COURT

No. 19141 Cr.

JOURNAL ENTRY

DATE MAR 17 1977

This cause came on to be heard upon the pleading and the ..... transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

This appeal follows defendant-appellant's (defendant), Howard Hudson's, conviction for aggravated murder and two counts of aggravated robbery. Defendant was sentenced to death by electrocution for the murder. 1/

Decedent, Al Mismas, died as a result of a shotgun wound inflicted at the K. of C. Bar at 5719 Harvard Avenue, Cleveland, in the early morning hours of March 27, 1975. Overwhelming evidence was adduced by the State to show: (a) Defendant, with two other men, entered the bar

1/ Defendant was sentenced to 7 to 25 years imprisonment for each of the robbery counts, to run consecutively.

at approximately 1 a.m. on March 27, 1975 (Tr. 301-303); (b) one of the men announced that it was a holdup (Tr. 303, 317); (c) defendant was carrying a shotgun (Tr. 303, 317) and had a shotgun shell in his mouth (Tr. 317 (d) the bartender, who had gone down into the basement to place the cash in a safe (Tr. 277), returned to the bar and was met at the basement door by defendant who pointed the shotgun at the bartender and said that if the bartender moved he was "dead" (Tr. 278), and pushed the bartender towards the end of the bar (Tr. 281); (d) as defendant was pushing the bartender, decedent turned slightly around on his stool and was shot by defendant from a distance of 3 or 4 feet (Tr. 269, 282-283, 308-309, 321-322).[2/]

During voir dire examination of prospective juror Robert Besch the following colloquy occurred:

> "Q Well, can you set aside what you have read and the fact that there will be -- maybe -- some testimony that the crime occurred in a bar, the Knights of Columbus Hall and Bar immediately adjacent thereto, which is run by the Knights of Columbus. And there will be testimony from people, owners of the bar and people that frequent bars.
>
> "Can you set aside the fact that they frequent taverns and may have a drink now and then and base your decision on this case if you are called upon as a juror in the case, based solely on the evidence that comes from their lips and their mouths on the incidents that occurred on this particular evening?
>
> "A Well, I'll tell you. I'm extremely partial on anything that deals with alcohol and drugs. I have been that way from ground up.
>
> "Q Well, are you saying, sir, that you cannot be fair and impartial then?
>
> "A I would have to say, yes." (Tr. 110-111)

2/ Norbert Vaitekunas, a companion of defendant's, testified that when he was with defendant earlier that evening defendant and companion, Raymond Delagarza, discussed robbing someone (Tr. 218) after defendant and Delagarza picked up a shotgun from an unidentified man (Tr. 216-217). Defendant carried the gun (Tr. 218). Vaitekunas dro defendant and several companions at the 66 Tavern shortly before 1 a.m. (Tr. 219). T 66 Tavern is just down the block from the K. of C. Bar (Tr. 265, 275).

The court then examined Besch to further ascertain whether Besch could afford the defendant a fair trial (see Tr. 111-112). The colloquy concluded:

> "MR. BESCH: I'm going to say that if a guy was drowning that I knew that was involved with drugs and I had the rope, I would be cutting it up.
>
> "THE COURT: You would be what?
>
> "MR. BESCH: Cutting the rope up."
>
> * * *
>
> "THE COURT: Young man, I tell you we are going to excuse you but you just stay outside. We'll want to talk with you again, perhaps after the jury is selected in this case. You are not excused, you are just simply removed from the jury at this time." (Tr. 112-113)

Counsel for defendant then moved for a mistrial based on the statements of the prospective juror (Tr. 113). The court did not specifically rule on the motion and proceeded immediately to call the next prospective juror (see Tr. 113-114).[3/]

During the voir dire examination of prospective juror Rosemary Basile Miss Basile stated that she does not believe in violence (Tr. 120) and saw no reason for violence (Tr. 121). The court then questioned the prospective juror at length about her attitudes and her ability to act as a fair juror (see Tr. 121-123). Miss Basile answered that her attitudes on non-violence might affect her judgment as a juror (see Tr. 125). The following colloquy between the court and the prospective juror followed:

> "THE COURT: How would you feel if something was to happen to you individually, wouldn't you want a fair trial?
>
> "MISS BASILE: Yes. And if I was --
>
> "THE COURT: If somebody had a feeling that they were very definitely against violence and then under that circumstance, even though they might be a fair person, you wouldn't want them to sit on your jury or if they had a strong feeling towards violence would you want them to sit and be your judge?

3/ We deem the court's conduct to mean that the motion was overruled.

"MISS BASILE: If I committed a violent act and somebody was sitting on a jury, supposedly of my peers, and said that they did not believe in violence and were non-violent, I would not want that person sitting on the jury for me.

"THE COURT: I see. Your feeling is, then, that nobody ever ought to be prosecuted if violence is part of the --

"MISS BASILE: I'm saying I don't feel quite qualified.

"THE COURT: --of the offense.

"MISS BASILE: "I don't feel qualified to sit in jugement [sic] of a person who committed a violent act. Because of how I feel on violence." (Tr. 125-126)

The prospective juror was challenged for cause by counsel for defendant (Tr. 126-127). The challenge was allowed and the court then stated to th dismissed juror:

"THE COURT: All right. Then, you may go outside and sit until we find time to discuss this with you." (Tr. 127)

At the conclusion of the trial the court charged the jury that defen ant had the burden of proving intoxication by a preponderance of the evi dence (Tr. 424-425). Where necessary, other facts will be discussed unde relevant assignments of error.

Defendant raises ten assignments of error.[4/] For reasons assessed below we find assignments four, five, and six well taken and the remainde without merit. We reverse and remand for a new trial.

Assignments of Error Nos. 1, 2, 3, 6:

"1) Failure of the Court to instruct prospective jurors concerning highly prejudicial remarks made by one prospective juror in the presence of the others was error.

"2) The Court erred in denying defense counsel's Motion for a Mistrial.

4/ Assignments of Error Nos. 7 through 10 were filed in a supplemental brief.

"3) Failure of the Court to grant Motion for Mistrial denied appellant's right to a fair and impartial trial in violation of the Due Process Clause."

* * *

"6) Due Process is violated when the Court reprimands a prospective juror, in the presence of the other jurors, for expressing an opinion which conflicts with the views held by the Court."

Assignments of Error Nos. 1, 2, 3, and 6 are considered together because they raise essentially the same issues.

The trial judge had a duty, during voir dire examination of prospect jurors, to ascertain whether a particular person examined qualified as a juror or was incapable of sitting as an impartial juror, see Crim. R. 24 (A)(9); see also ABA Standard on Trial by Jury §2.4.

The honest expression of opinion by prospective jurors during voir dire is not necessarily prejudicial to the defendant. Rather, where the specific opinion expressed by the prospective juror is of that quality that it is inherently prejudicial to defendant by virtue of the fact tha other prospective jurors have heard the remark(s), there is an immediat duty on the part of the court to stop further interrogation, State v. Strong (1963), 119 Ohio App. 31, 34-35, cf. Irwin v. Dowd (1961), 366 U.S 717, 722-723, 6 L.Ed. 2d 751, 756.

Here, prospective juror Besch merely expressed an opinion that in cases involving drugs or alchohol he could not be fair and impartial (Tr. 110-111). The court then posed several questions to Besch in an effort to ascertain whether Besch could put aside his attitudes and fairl evaluate evidence presented at trial (see Tr. 111-112). The prospective juror's remarks were expressions of the juror's attitudes on a general subject. The remarks did not specifically or inferentially implicate the defendant as did those remarks found to be prejudicial in State v. St

supra at 34.[5] Therefore, the court did not err in overruling the motion for mistrial, the potential juror's remarks did not preclude a fair trial and the court was correct in not having given a special instruction to the remaining prospective jurors.[6]

Assignments of Error Nos. 1, 2, and 3 are not well taken.

The issue raised by assignment of error six is somewhat different. Prospective juror Basile's comments (see Facts recital, infra, pp. 4-5) were harmless to defendant, but indicated her personal attitudes which might have precluded her ability to function as an impartial juror. The prospective juror expressed her concern for this very fact. The court properly inquired as to whether her attitudes did, in effect, block her ability to be impartial and fair. However, the content and context of the court's remarks (see Tr. 124-126) indicate the court's impatience an roughness with the prospective juror. Following the close and often tou interrogation by the court, co nsel for defendant entered an objection f cause. The court's final remark to the dismissed prospective juror (Tr. clearly implied that the court disapproved, or found distressing, her expression of honest opinion. The question raised here is whether the court's final remark, viewed in the context of the court's earlier inter rogation, constituted a "chilling effect" upon other prospective jurors' likelihood to freely and honestly express their opinions and attitudes which they individually felt could preclude their impartiality.

5/ In Strong the prospective juror stated that, "This man, he killed two people . and a dog", supra at 33. It appears that the remarks were prejudicial by their impli tion of defendant's guilt. In the instant case, defendant's guilt was not raised. Only the general subject of the prospective juror's abhorence of drugs and alchohol w discussed.

6/ If the remarks were prejudicial it clearly would have been innocuous if the cou had given a "curative" instruction, see State v. Strong, supra at 36. Because the in remarks were not prejudicial, the court's decision not to give any admonishment or instruction was not an abuse of discretion because the court prevented possible preju by not further emphasizing the nature of the juror's remarks.

We cannot say that the court's interrogation and final remarks did not "chill" the honesty and forthrightness of the remaining prospective jurors. In this case with the charge of aggravated murder, with defendant's life potentially at stake, it was error for the court to assume such a heavy-handed role in voir dire examination of prospective jurors that veniremen dismissed for cause are impliedly to be chastised for thei honest expression of partiality and bias. While the error here does not rea the level of the error in the Strong case (and standing alone it would no be prejudicial), coupled with other facts in the trial, this error reache the prejudicial stage. Under the circumstances we cannot say that defend ant received a fair trial by twelve impartial jurors.

Assignment of Error No. 6 is well taken.

Assignments of Error Nos. 4 and 5:

"4) The appellant was denied due process as a consequence of the State being relieved of its obligation to prove certain elements of the offense charged beyond a reasonable doubt.

"5) The trial court erred in instructing the jury that the defendant had the burden of proving intoxication by a preponderance of the evidence."

The Ohio Supreme Court has recently held that Ohio Revised Code §2901.05(A) mandates that the burden of proof beyond a reasonable doubt rests with the State and the burden of proving affirmative defenses does not shift to the defendant. A defendant only has the burden of going forward with sufficient evidence to raise the issue. Once the issue is raised and goes to the jury for resolution, there is no occasion to discuss burden of proof in relation to the defendant. The State retains the burden of proving guilt beyond a reasonable doubt. It was, therefor error for the trial court to instruct the jury that the defendant had th burden of proof of the affirmative defense, State v. Robinson (1976), 47 Ohio St. 2d 103, 110-113.

Here, defendant raised the defense of intoxication which is an affirmative defense in Ohio, State v. Robinson, supra at 108, and reaches intent, an element of the crime charged. The court erred prejudicially in instructing the jury that defendant had the burden of proving that defense by a preponderance of the evidence (Tr. 424-425), State v. Robinson, supra. Because Robinson was decided on statutory grounds and these assignments can be disposed of on the basis of the statute as interpretation in Robinson, we need not reach the broader constitutional questions raised by defendant with respect to the court's charge (see Defendant's Brief, pp. 9-12).

Assignments of Error Nos. 4 and 5 are well taken. 7/

Assignment of Error No. 7:

> "7) That to the extent either that our death penalty statutes require, or the trial court found that the appellant had not proven the existence of facts in mitigation to avoid the imposition of the death penalty, the appellant was denied due process."

Defendant's argument is essentially that Mullaney v. Wilbur (1975), 421 U.S. 684, 44 L.Ed. 2d 508, extends to the instant case thus mandating that any requirement that defendant prove mitigating factors to avoid the death sentence be deemed a violation of due process. Mullaney v. Wilbur, supra, does not extend to the instant case because Mullaney only precludes on due process grounds, a requirement that a defendant prove any element of a crime. Here, defendant challenges a requirement that defendant prove mitigating circumstances with respect to sentencing. Because the punishment aspect of a case, i.e., sentencing, is clearly distinguishable from

7/ At trial, counsel for defendant failed to object to the charge and state specific grounds for the objections required by Crim. R. 30. However, these assignments of error are addressed under Crim. R. 52(B), which permits the court to notice errors affecting substantial rights.

the adjudicatory phase, we conclude that the Ohio statute challenged here does not violate the due process clause of the United States Constitution even though a defendant found guilty must prove the mitigating circumstances by a preponderance of the evidence.

The seventh assignment of error is not well taken.

Assignments of Error Nos. 8 and 9:

"8) The statutes (R.C. of Ohio, §§2929.03 and 2929.04) under which this appellant was sentenced to death violates the eighth amendment to the United States Constitution.

"9) Assuming the above statutes are at least valid 'on their face', then as utilized herein as a basis for imposing the death penalty, they violate rights guaranteed this appellant by the eighth amendment."

The Ohio Supreme Court has recently considered and rejected the argument that the Ohio Death Penalty statute is unconstitutional as violation of the Eighth Amendment, State of Ohio v. Bayless (1976), 48 Ohio St. 2d 73. Because the Ohio Supreme Court has passed on this question in State of Ohio v. Bayless, supra, we are bound to follow the Bayless rule.

The eighth and ninth assignments of error are not well taken.

Assignment of Error No. 10:

"10) The court abused its discretion in failing to grant the defense a continuance to obtain evidence arguably relevant to the appropriateness of the sentence imposed."

The granting of continuances is within the discretion of the court. Here, approximately two months had elapsed from the end of trial until the sentencing hearing on the murder conviction (Supp. Tr. 28). During that period of time there is no record evidence that counsel for defendant made any effort to obtain the alleged medical records in advance of the hearing date for sentencing (see Supp. Tr. 20-23). Under these circumstances the court did not abuse its discretion in overruling defendant's request for a delay of the hearing date.

Assignment of Error No. 10 is not well taken.

Reversed and remanded for further proceedings according to law.

No other error appearing in the record, this cause is remanded to the Common Pleas Court for further proceedings according to law.

It is, therefore, considered that said appellant (s) recover of said appellee (s) his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAY, C. J., _____

JACKSON, J., _____

PATTON, J., CONCUR _____

Jack G. Day
PRESIDING JUDGE
Jack G. Day

For plaintiff-appellee: John T. Corrigan
For defendant-appellant: Peter Hull and James Willis

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indic journalization, at which time it will become the judgment and order of the court and time period for review will begin to r

STATE OF OHIO)		IN THE COURT OF APPEALS
) ss:		NINTH JUDICIAL DISTRICT
SUMMIT COUNTY)		(January Term, 1976).

STATE OF OHIO,	)	C. A. No. 7780
	)	
Plaintiff-Appellee	)	
	)	
v.	)	APPEAL FROM JUDGMENT
	)	ENTERED IN THE COURT
SANDRA LOCKETT	)	OF COMMON PLEAS OF
	)	SUMMIT COUNTY, OHIO
Defendant-Appellant	)	CASE NO. 75 1 96

DECISION AND JOURNAL ENTRY

Dated: March 3, 1976

This cause was heard January 28, 1976, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

DOYLE, J.

This appeal is presented from a judgment of the Court of Common Pleas of Summit County, in which court the defendant-appellant, Sandra Lockett, was convicted of the crimes of aggravated murder with two specifications and aggravated robbery. Pursuant to the verdict of the jury, the court, after conducting the statutory sentencing hearing

overruled.

Assignment of Error No. 7

"The instructions to the jury on the charge of involuntary manslaughter and the failure to instruct on the defense of accident represented plain error substantially affecting the rights of the defendant."

Ohio Crim. R. 30 covers this assignment of error. However, it is observed that the court's charge on involuntary manslaughter would adequately include an accidental killing during a robbery. There is no error here.

Assignment of Error No. 8

"The trial court erred in imposing the death sentence on appellant, Sandra Lockett, for aiding and abetting an aggravated murder, while permitting the trigger-man, the principal, Al Parker, to be given the lesser sentence of life-imprisonment.

"A. For the prosecution to enter into a deal with the principal in the murder to give him a sentence of life imprisonment in exchange for his testimony against the aiders and abetters, was repugnant to concepts of fair play and justice and unconstitutional selective enforcement under the Due Process and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

"B. Sentencing appellant, Sandra Lockett, to a more severe sentence than principal, Al Parker, is a 'legal contradiction' which must be corrected."

Prior to the trial of this case, the defendant was

offered the same "negotiated plea" that was allowed to Parker, the State's chief witness. She refused the offer on several occasions and voluntarily consented to trial before a jury. In fact, her attorney explained in specific language what might be the consequences of a trial but after conference she continued to refuse the offer. She voluntarily assumed the risk of a death penalty.

That the triggerman in a murder should receive a life sentence and an accomplice or aider and abettor should receive a death sentence may appear unusual, but it must be observed that this accused was just as guilty of aggravated murder and aggravated robbery culminating in murder as was the man who pulled the trigger. In fact, this defendant was not only an actual participant in the robbery but she was one of the chief negotiators of the robbery of the particular store and was an active manager of the entire affair, including the method employed to secure the gun used in the murder.

We do not find here a violation of any constitutional rights of the defendant and the assignment of error is overruled.

Assignment of Error No. 9

"The jury verdict of guilty on the charge of aggravated robbery is not supported by

felonious acts of the triggerman, Al Parker, including that of aggravated robbery.

This claim of error is not sustained and is overruled.

Assignment of Error No. 13

"The ineffectiveness of trial counsel denied defendant-appellant of her Sixth Amendment right to counsel."

It has been heretofore stated that the trial counsel appointed for the defendant-appellant were competent lawyers of high standing and that their trial strategy came well within the rules of good practice. Mere failure to make objections, which on hind sight may seem appropriate, is not sufficient in this case to establish reversible error.

This claim of error is not well taken and is overruled.

Assignment of Error No. 14

Sections 2903.01, 2929.03 and 2929.04 of the Ohio Penal Code permits arbitrary imposition of the punishment of death in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States."

Last year (1975) this court had before it on appeal the case of State of Ohio v. Bayless, Summit No. 7513, unreported. We then held, and now hold in the instant case, that Ohio's latest capital punishment statutes do not allow the arbitrary imposition of the death penalty nor does their enforcement constitute cruel and unusual punishment.

The State of Ohio permits capital punishment under the guide lines set out, and the enforcement of this statute does not contravene the provision of the Constitution. We affirm our conclusion in Bayless, supra, and overrule this assignment of error.

Assignment of Error No. 15

"The death penalty offends contemporary standards of decency and constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States."

This assignment of error is overruled. This court, in previous cases, has denied this claim. We believe this case was tried and judgment entered within constitutional and statutory boundaries, and the error now claimed is not sustained.

Assignment of Error No. 16

"The sentencing stage following a conviction for aggravated murder with specifications is unconstitutional in that it places the burden on the defendant to establish a reason why he should not be executed."

The record establishes a compliance with R.C. 2929.03. Following the jury's verdict and judgment thereon that the defendant had committed aggravated murder with two specifications and aggravated robbery, the trial court accorded the defendant the statutory hearing required in

R.C. 2929.03. The hearing is given for the purpose of hearing evidence in mitigation of the statutory death penalty. This statute states that if it be found "that none of the mitigating circumstances listed in division (B) of Section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment."

Mitigation of sentence has traditionally been a defense function, and the right of leniency has always been based upon the circumstances of the case and of the circumstances surrounding the defendant himself. R.C. 2929.04(B) reads:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [preponderance] of the evidence:
>
> "(1) The victim of the offense induced or facilitated it.
>
> "(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> "(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense

of insanity."

We find no conflict with the Constitution or other laws in this statutory provision governing mitigation of sentence pursuant to a separate hearing after guilt has been established. In fact, it provides an added benefit to the convicted felon.

This assignment of error is without merit.

Assignment of Error No. 17

"The trial court should not have imposed the death penalty in this case, because the offense was primarily the product of a mental deficiency, and such fact precludes the death penalty, under O.R.C. §2929.04(B)(3)."

The testimony of men who were shown to be experts in their respective fields was of sufficient verity for the trial court to conclude that the defendant did not fall within the category of persons exempted by the statutes from capital punishment. All of the examiners concluded that the defendant was not suffering from a mental deficiency and that the defendant's participation in affairs of which she was charged was not a product of a psychosis or mental disorder amounting to a mental deficiency.

This assignment of error is not well taken and is overruled.

Assignment of Error No. 18

"The defendant was denied a fair trial and due process of law by reason of misconduct of the prosecutor during the course of the trial."

It has long been the law of this State that improper remarks of counsel for the State during argument, unless so flagrantly improper as to prevent a fair trial, should be at once objected to; otherwise, error cannot be predicated upon the remarks alleged to have been improper.

Here the record is devoid of objections in most instances. As a consequence, the defendant has waived her right, if any existed, to raise the issue of prejudicial error. Over and beyond this, however, there is no error claimed which, if true, prevented a fair trial.

We find no error of a prejudicial character in this claim and it is overruled.

This case presents a heinous murder of an innocent victim. We have examined with care each and every claim of error and find none prejudicial to the rights of the defendant denying to her a fair trial. Her constitutional and statutory rights have been well guarded by the trial court and the final judgment here under review must be and hereby is affirmed.

The judgment is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Court of Common Pleas to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten days from the date hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals, at which time the period for review shall begin to run. Appellate Rule 22(E).

Costs taxed to appellant.

Exceptions.

William A. Vitter

Presiding Judge
- for the Court -

VICTOR, P.J. and
BRENNEMAN, J.
CONCUR.

(Doyle, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment under authority of Section 6.(C)Article IV, Constitution).

OHIO DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION
DIVISION OF BUSINESS ADMINISTRATION
BUREAU OF STATISTICS

RB-197
Rev. 1-7

JUDICIAL-CRIMINAL STATISTICS

TERMINATED CASE REPORT

1. COUNTY OF INDICTMENT Trumbull

Do Not Write In Space Below
STATE OFFICE USE ONLY

3. CHECK ONE:
SEX
☐ 0-MALE
☐ 1-FEMALE

4. CHECK ONE:
RACE
☐ 2-WHITE
☐ 3-NEGRO
☐ 4-YELLOW
☐ 5-OTHER

5. AGE AT FILING OR ARRAIGNMENT _____

7. DATE OF FILING OR ARRAIGNMENT _____ MONTH _____ YEAR

10. DATE CASE TERMINATED _____ MONTH _____ YEAR

15. DISPOSITION (CHECK ONE ONLY)
☐ 0-PLEAD GUILTY
☐ 1-TRIAL BY JURY-GUILTY
☐ 2-TRIAL BY COURT-GUILTY
☐ 3-TRIAL BY JURY-NOT GUILTY
☐ 4-TRIAL BY COURT-NOT GUILTY
☐ 5-TRANSCRIPT DISMISSED
☐ 6-INDICTMENT DISMISSED OR NOLLE PROSSED
☐ 7-NO BILL
☐ 8-TO MENTAL INSTITUTION
☐ 9-OTHER

1	2
	3
	4
5	6
7 8	9
10 11	12
	15
	16
	17
23	24
25	26

50	51	52	53	54	55	56	57	58	59

16. SENTENCE (CHECK ONE ONLY)
☐ 0-NONE
☐ 1-IMPRISONMENT
☐ 2-FINE AND IMPRISONMENT
☐ 3-FINE AND/OR COST
☐ 4-FINE AND/OR COST SUSPENDED
☐ 5-SUSPENDED OR DEFERRED SENTENCE
☐ 6-PROBATION
☐ 7-LEGAL ELECTROCUTION

50. DOCKET NUMBER _____

17. INSTITUTION CONFINED TO (CHECK ONE ONLY)
☐ 0-NONE
☐ 1-CHILLICOTHE
☐ 2-O. S. R.
☐ 3-O. R. W.
☐ 4-JAIL
☐ 5-WORKHOUSE
☐ 6-L. S. H.

61. DEFENDANT'S NAME

23. OFFENSE CHARGED * _____ (USE CODE LIST ON BACK OF FORM)

25. OFFENSE CONVICTED ** _____
(IF UNABLE TO CODE, EXPLAIN IN APPROPRIATE SPACE ON THE BOTTOM OF REVERSE SIDE)

LAST _____ FIRST _____ MIDDLE _____

NO. 76-38

IN THE SUPREME COURT OF OHIO

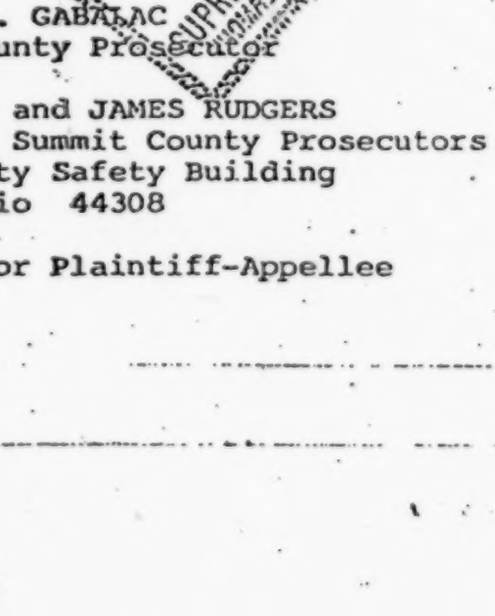
Appeal from the Court of Appeals
Ninth Judicial District
Summit County, Ohio
(C.A. No. 7784)
(C.P. No. 75 1 52)

STATE OF OHIO
Plaintiff-Appellee

vs

FLOYD EDWARDS
Defendant-Appellant

BRIEF OF DEFENDANT-APPELLANT



CHUPARKOFF, LOMBARDI & REED

By: TED CHUPARKOFF
501 E. Exchange Street
Akron, Ohio 44304

Counsel for Defendant-Appellant

STEPHAN M. GABALAC
Summit County Prosecutor

FRED ZUCH and JAMES RUDGERS
Assistant Summit County Prosecutors
City-County Safety Building
Akron, Ohio 44308

Counsel for Plaintiff-Appellee

of the prosecution's case and to anticipate beforehand the evidence which the State has to present to the jury. Calling witnesses unknown to the Defendant deprives the Defendant of his right of discovery which is prejudicial to his rights of a fair trial.

The Court of Appeals, in overruling Defendant's claim that to allow Officer Davis to testify was prejudicial, found said error to be non-prejudicial for the reasons that:

1. Mack Newberry, Davis' partner, suffered a heart attack the night before;
2. Officer Davis' testimony was not crucial;
3. Rule 16-E-3 permits the Court in its discretion to allow such testimony.

The Defendant obviously disagrees. First of all, the Court erred in concluding Newberry was a Police Officer and Davis' partner. (p. 293 and 341). Mr. Newberry was to be a lay witness. Secondly, if Davis' testimony was not crucial, why was he called? How did the State propose to introduce State's Exhibits 4 through 10 into evidence, and finally Criminal Rule 16-E-3 pertains to physical evidence, not witnesses.

The Court admits that the prosecution erred, but concludes that it is non-prejudicial. It is the Defendant's position, as noted in proposition #1, any error deprives the Defendant of a fair trial, and this is especially true when so-called non-prejudicial errors are compounded.

OFFENSE CHARGED & CONVICTED CLASSIFICATION

*If Defendant is charged and not convicted fill in Offense Charged
**If Defendant is charged and convicted, fill in both Offense Charged & Convicted

Code	ORC Chapter	Type of Offense
01	2903.-	Homicide and Assault
02	2905.-	Kidnapping and Extortion
03	2907.-	Sex Offenses
04	2909.-	Arson and Related Offenses
05	2911.-	Robbery, Burglary, and Trespass
06	2913.-	Theft and Fraud
07	2915.-	Gambling
08	2917.-	Offenses Against the Public Peace
09	2919.-	Offenses Against the Family
10	2921.-	Offenses Against Justice and Public Administration
11	2923.-	Conspiracy, Attempt, and Complicity; Weapons Control
12	3719.-	Drug Offenses
13	2927.-	Miscellaneous Offenses

Offense (s) Charged

Ohio Revised Code Section (s):

Offense (s) Convicted

Ohio Revised Code Section (s):

MAIL COMPLETED FORM TO:

BUREAU OF STATISTICS

DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

3201 ALBERTA STREET

COLUMBUS, OHIO 43204

CERTIFICATE OF SERVICE

I hereby certify that all persons required to be served have been served and that I have sent by first class mail a copy of the foregoing Appendix to Petition for a Writ of Certiori to counsel for the Respondent, Stephan M. Gabalac, Summit County Prosecutor, City-Counsel Safety Building, Akron, Ohio 44308 on this 24th day of June, 1977.

Richard S. Agnor
Counsel for Petitioner